PUBLIC PROSECUTOR

v.

CHOO YEE KEANG

HIGH COURT MALAYA, KUALA LUMPUR
PS GILL JC
[CRIMINAL TRIAL NO. 58-12-88]
10 SEPTEMBER 1990

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Evidence of identification - Fleeting glance - Mistaken identity - Break in the link of observation - Cautioned statement - Consistent with evidence - Presumption - Balance of probability - Reasonable doubt - Dangeroud Drugs Act 1952, ss. 37(d), 39B(1)(a), 39B(2).*

EVIDENCE: *Identification - Principles in R. v. Turnbull.*

The accused was charged with trafficking in dangerous drugs under s. 39(B) of the Dangerous Drugs Act 1952 (DDA) in relation to 36.30 grammes of heroin. Evidence was led by the prosecution that the accused was one of two persons in the house where the drugs were found. The prosecution witness PW4 identified the accused as the male Chinese in white T-shirt whom he had observed in the house through the window (although the room was poorly lit by 2 candles) and subsequently at the door, to be the same person he arrested outside the house.

There was a short break in the link of observation as the person who PW4 had seen at the door had shut the door and it was only after a short interval that the raiding party had succeeded on entering the premises. The arrest was made outside the premises. The accused gave a cautioned statement.

Held:

[1] The quality of PW4's evidence pertaining to the identification of the accused is poor and unreliable and it is possible that PW4 could have made an honest mistake in assuming that the person he detained outside was the very person he saw inside the house, especially when the person he detained outside was also wearing a white T-shirt. The testimony of PW4 on the issue of the identity of the accused must be held to be inherently improbable.

[2] The case for the defence was supported by the cautioned statement of the accused which was consistent with particulars of the evidence given by the accused in Court.

[3] The evidence of the accused was in no way shaken under cross-examination and strengthened the case for the defence in casting a doubt as to whether this could have been a case of mistaken identity. The mere fact of presence could be equally consistent with innocence as with guilt. There was no evidence that there was any attempt by the accused to take part in the commission of the offence neither was there any direct evidence that the accused was in possession of the drugs.

[4] On a balance of probability the defence has rebutted the presumption under s. 37(d) of the DDA.

[Accused acquitted and discharged.]

Cases referred to:
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(cit)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(foll)***
Ragunathan v. PP [1982] CLJ (Rep) 63 ***(cit)***
Regina v. Turnbull [1976] 3 WLR 445 ***(cons)***
Wong Nyet Wah v. PP [1962] MLJ 312 ***(cit)***
Yau Heng Fang v. PP [1985] CLJ (Rep) 350 ***(cit)***
Yau Sun Fatt v. PP [1988] 1 CLJ (Rep) 305 ***(cons)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a), (2)

For the public prosecutor - Hafilah bte Daud, DPP
For the accused - C.L. Sequerah (Darshan Singh with him)

JUDGMENT

PS Gill JC:

The accused was charged for an offence under s. 39B of the DDA (Dangerous Drugs Act) 1952 and the charge reads as follows:

> That you jointly with another person still at large on 17 November 1987 at about 1 a.m., at an unnumbered house at Jalan Doraisamy, in the Federal Territory, in the City of Kuala Lumpur, did traffic in dangerous drugs to wit 39 plastic packets of heroin weighing a total of 36.30 grammes and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and is punishable under s. 39B(2) of the same Act.

On 17 November 1987 on information received, a party of police personnel led by ASP Md. Yusoff bin Hussein (PW3) together with D/Sgt. Syed Ariszuddin, D/Cpl. Teoh. DPC Rosly, DPC Harvinder Singh proceeded to make a raid on an empty unnumbered house in Kg. Doraisamy, Kuala Lumpur.

On arriving at the said house at about 1.00 a.m. the party of police apprehended a male Chinese at the rear of the house. PW3 then instructed D/Cpl. Rosly and DPC Harvinder Singh to observe what was happening inside the house because he saw a light coming from inside the house. DPC Rosly and DPC Harvinder Singh then proceeded to make an observation of the inside of the house through a window. PW4 saw two persons squatting down and they were putting something inside plastic packets. He also saw two lighted candles and some empty plastic packets and some packets that had been filled up with some substance lying on the floor. PW4 saw one male Chinese wearing a white T-shirt and the other man wearing a dark shirt. He saw them for about 2 to 3 seconds. After that PW4 and DPC Harvinder Singh proceeded to the front door of the house, and on reaching the front door of the house he found it to be closed. Then the door was opened by a man and he shone his torchlight on the man's face. He stated that the man who opened the door was wearing a white T-shirt and after observing him for a few seconds the man closed the door.

After the door was closed, PW4 and DPC Harvinder Singh tried to open the door and after some effort succeeded in doing so. On entry, he saw the man with the white T-shirt running away out of the house through a window of the building. PW4 said, he also jumped out of the house through the same window and saw a man running, chased him and arrested him outside the house. Later the male Chinese who was arrested by him together with PW3 and himself came back to the house. By that time the other members of the raiding party were already in the house.

In the house the police party saw 2 candles and plastic packets with some pink granular substances believed to be heroin lying on the floor. PW3, ASP Yusoff seized the exhibits in the house and brought the accused together with the exhibits to C.A.D. (Cawangan Anti Dadah) office in Jalan Hang Tuah and later PW3, ASP Yusoff lodged a report, Dang Wangi Report 17038/87.

It can be seen from the evidence adduced by the prosecution that the principal witness who gave evidence and identified the accused person to be the person in the house at the material time was PW4, DPC Rosly. The rest of the evidence related to the sending of the exhibits to the chemist, PW2 for analysis, the result of the analysis, and finally the steps taken to ensure that the exhibits were properly packed and sealed for delivery to the police and subsequent tendering of the exhibits in Court as prosecution exhibits. The chemist testified that the exhibit P5 did contain 36.30 grammes of heroin as defined in the Dangerous Drugs Act 1952 as amended by Act A491. The defence did not seriously challenge the result of the chemist analysis except for the date of the report. In any case I am satisfied that the error in the date in the report was a typographical error and does not in any way invalidate the report.

PW4's evidence was that he observed two male Chinese in the house and at that time of his brief observation the two male Chinese were packing some plastic packets with a pink granular substance. He saw the face of the male Chinese wearing a T-shirt with the aid of 2 candle lights. Apart from the light from the candle light, there was no other light in the house or outside the house. He saw the male Chinese twice very briefly. Once from outside the window of the house and once at the door of the house. On all these occasions he saw the face of the man for a few seconds. On entering the house he saw the male Chinese running out of the house through a window and he gave a chase and arrested the male Chinese who had fallen down outside the house. At this stage the prosecution had adduced evidence from its witness especially PW4 and the evidence if believed against the accused person and bearing in mind the Privy Council case of *Haw Tua Tau* followed by the Federal Court case of *Ragunathan v. PP*. I feel I had no option but to call for the defence. In the circumstances at the close of the case for the prosecution, applying the principles enunciated in the above-quoted case I did not then proceed to evaluate the credibility and reliability and the accuracy of the evidence of the witness for the prosecution particularly PW4, but instead left these questions until after the conclusion of the case for the defence and after the hearing.

Having directed myself as aforesaid, I called upon the defence of the accused and he elected to give evidence on oath. In a nutshell the case for the defence which was supported by the cautioned statement of the accused in material particulars was that at the material time and date of the commission of the alleged offence the accused had gone to the abandoned house at Kg. Doraisamy (referred to as the "said house" hereinafter) with the purpose of buying heroin for his own consumption from one 'Ah Tuck'. On reaching the said house, the accused called for 'Ah Tuck' who was there in the said house and he was told to wait at the back of the house. The accused admitted having purchased heroin from 'Ah Tuck' on previous occasions. While waiting for 'Ah Tuck' at a place marked 'B' in the sketch plan P25, he saw two or three persons jumping out of the house through a window marked 'B' in the sketch plan P25. He stated he became confused and frightened and he ran. While running he fell and was then apprehended. He stated he was wearing a white T-shirt that night. After his arrest he gave his cautioned statement to Inspector Basharuddin on 17 November 1987 at 5.40 p.m. His statement was consistent in material particulars with the evidence given by him in Court. PW4's evidence of the identification of the accused person as being the person he saw in the house at the material time and date was strongly denied by the accused. The

evidence of identification of the accused should be examined closely to see in what circumstances it was made bearing in mind the condition of light. PW4 stated he saw the face of the accused the first time from the window for two to three seconds when the accused was squatting down with another man and both men were putting some substance in plastic bags. The accused was looking down and not looking up. There were two candles lit in the otherwise dark room. PW4 stated under cross-examination that when he saw the accused from the window it was a split second observation of the accused's face.

The next occasion PW4 saw the accused's face was when the accused poked his head out of the door. On this occasion he saw the accused from far about 3 to 4 seconds. PW4 then had some difficulty to open the door and after a few minutes managed to open the door with the help of DPC Harvinder Singh. On entering the house he saw a man in a white T-shirt jumping out of a window with the man's back towards him. He did not see the face of the man jumping out. He stated he also chased the man and later he arrested the man with the white T-shirt outside the house.

It is obvious from the evidence that PW4 had a fleeting glimpse of the male Chinese he saw squatting in the house, later at the door and the male Chinese who ran out of the house through the window. The male Chinese was wearing a T-shirt and PW4 stated that his identification of the male Chinese was aided by the fact that the male Chinese was wearing a white T-shirt. He stated that this male Chinese was a stranger to him, and apart from the candle light flickering, there was no light in the house or outside the house. He further stated that he saw 2 persons in the house, therefore he must have taken some time to look at the other male person who escaped capture by the police. I am of the view having observed PW4 giving evidence and having heard him in the witness box that the quality of his evidence pertaining to the identification of the accused is poor and unreliable. In the poor prevailing lighting condition, it is possible that PW4 could have made an honest mistake in assuming that the person he detained outside was the very person he saw inside the house, especially when the person he detained outside the house was also wearing a white T-shirt. In my opinion in view of the poor opportunity for PW4 to observe and recognise the face of the male Chinese found in the house at the material time, particularly after a fleeting glimpse and poor lighting his testimony on the issue of the identity of the accused must be held to be inherently improbable. It must also be borne in mind that the accused was not the only person in and around the vicinity of the house in question. In the case of *Regina v. Turnbull* [1976] 3 WLR 445, Lord Widgery CJ made the following observations in regard to identification. At p. 447 his Lordship stated:

> How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with.
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> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone who he knows, the jury should be reminded that mistake in recognition of close relatives and friends are sometimes made.
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> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

> In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it.
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> When, in the judgment of the trial Judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word.

The observations in the case of *Regina v. Turnbull* were adopted in the case of *Yau Heng Fang v. PP* [1985] CLJ (Rep) 350. It must be borne in mind that PW4 did not state categorically that when he entered the house in question he saw the male Chinese escaping through the window and did not lose sight of him, until he arrested the male Chinese. Then apart from the poor observation made earlier of the male Chinese in the house, there was a break in the link of observation between the time PW4 saw the male Chinese in the house and the time he detained a male Chinese outside the house.

The accused gave his evidence on oath and stated quite categorically that he was not inside the house in question at the material time. His evidence was supported in material particulars by the cautioned statement which was made on the same day of the arrest and in the statement he denied being in the house in question and also denied that he had anything to do with the drugs. He stated that it was a case of mistaken identity especially when he was not the only person in or around the house at that time. It was admitted by him at the evidence of the prosecution witnesses both PW3 and PW4 that there were other houses nearby to the house in question.

Just as the Supreme Court had stated in the case of *Yau Sun Fatt v. PP* [1988] 1 CLJ (Rep) 305 that a cautioned statement of an accused person may sometimes be the mainstay of the prosecution case, it is submitted with respect that the same criteria should apply when the cautioned statement is submitted by the accused in his defence, especially when it was made as in this case on the very date of his arrest and is consistent with his evidence in Court.

The evidence of the accused was in no way shaken under cross-examination by the learned Deputy Public Prosecutor. In fact the accused's evidence strengthened the case for the defence in casting a doubt as to the fact whether this could have been a case of mistaken identity. It was submitted by the prosecution that the accused's presence at the scene of the offence lent weight to the fact that he may very well have been involved in the commission of the offence. As held by Ong J (as he then was) in the case of *Wong Nyet Wah v. PP* [1962] MLJ p. 312 quote:

> The mere fact of presence could be equally consistent with innocence as with guilt.

The Lordship went on to quote the case of *Gray* 12 Cr App R 244 where Lord Reading CJ stated:

> Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence.

In the instant case there was no evidence that there were any attempts by the accused to take part in the commission of the crime.

It is the duty of the prosecution to establish the guilt of the accused person. On the evidence that must be capable of only one construction, namely the guilt of the accused person. In the instant case having heard and considered all the evidence adduced both by the prosecution and the defence, I am unable to come to that conclusion. In view of the grave doubts as to the quality of the evidence identification of the accused, I am of the view that PW4's evidence as regards the identification of the accused is totally unsafe.

Lastly, even if it is held that the identification of the accused by PW4 is reliable, having heard the accused's evidence and supported by his cautioned statement, I have no doubt that on a balance of probability the defence has rebutted the presumption under s. 37(d) of the Dangerous Drugs Act 1952. The onus on the defence is to prove its case on the balance of probability as stated in the case of *PP v. Yuveraj* [1969] 2 MLJ 89.

I have considered the evidence as a whole and I found no direct evidence that the accused was in possession of the dangerous drugs. The defence has created a reasonable doubt in my mind as to the truth of the prosecution case and as to the guilt of the accused.

In the circumstances, I find the accused not guilty of the charge and he is acquitted and discharged.

Also found at [1991] 3 CLJ 2909